In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No.

NICK KARNEGES, et al., *Petitioners*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioners, Nick Karneges, Connie Karneges and Janice Sapanos, respectfully pray that a writ of certiorari issue to review the order granting motion for summary affirmance of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 17, 1971.

OPINION BELOW

The opinion and order of the Court of Appeals appears in Appendix A hereto.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its order granting motion for summary affirmance on January 17, 1971, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a cause of action against the United States Government under the Federal Tort Claims Act, 28 U.S.C. §1346(b), to recover for injuries suffered by a serviceman while traveling by private automobile between bases pursuant to group travel orders, is barred by the decision of this Court in *Feres v. United States,* 340 U. S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, §1346 . . .

> b. Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages occurring on and after January 1, 1945, for injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

Petitioners are parents and sister of James Peter Karneges. James Peter Karneges was killed in an automobile accident while riding as a passenger in a private vehicle owned and operated by Thomas Franklin Crow. At the time of the accident both Thomas Franklin Crow and James Peter Karneges were members of the United States Marine Corps, and were traveling pursuant to group travel orders. Crow furnished his private vehicle for transportation as authorized by the group travel orders.

Petitioners brought action on behalf of James Peter Karneges, deceased, against the United States under the Federal Tort Claims Act, 28 U.S.C. §1346, in the United States District Court for the Southern District of California. The District Court granted summary judgment in favor of the United States of America and against petitioners on the basis that recovery was barred by *Feres v. United States,* 340 U.S. 135. A timely appeal to the United States Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court was taken by petitioners.

The Court of Appeals for the Ninth Circuit granted respondent's motion for summary affirmance on the ground that recovery under the Federal Tort Claims Act was barred by *Feres v. United States,* 340

U.S. 135, since Karneges was "in line of duty", acting "incident to his military service."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER STANDARD TO APPLY TO CLAIMS OF SERVICEMEN UNDER THE FEDERAL TORT CLAIMS ACT.

The problem of claims of dependants of servicemen under the Federal Tort Claims Act has been considered by this Court in *Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949); *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950); and *United States v. Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In *Brooks,* recovery was allowed where the claims arose from death and injuries sustained by two servicemen on furlough resulting from the collision of the vehicle in which they were riding. Where injuries were sustained while the servicemen were on duty, *Feres* denied recovery. *Brown* was a malpractice case involving a veteran who was negligently treated; recovery was allowed.

In *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), (a case basically concerned with the applicability of the Federal Tort Claims Act to prisoners in federal penal institutions) Chief Justice Warren, speaking for this Court, discussed the rationale of *Feres* and concluded that *Feres* rests largely upon the effects of the maintenance of suits under the Federal Tort Claims Act on military discipline.

From the above cases there has evolved some confusion in the District Courts and the Courts of Appeals with respect to the proper standards to apply in determining whether a serviceman may recover under the Federal Tort Claims Act.

In this case, the Court of Appeals for the Ninth Circuit granted respondent's motion for summary affirmance on the basis that petitioners' deceased was "in line of duty", acting "incident to his military service" so that recovery against the United States is barred. The court made no distinction between "in line of duty" and "incident to military service" so that presumably recovery would be barred whether the injury arose out of "line of duty" or out of "incident to military service." The court's decision is consistent with prior decisions of the Ninth Circuit in that the Ninth Circuit has not recognized any distinction between the standard of "incident to military service" and "in line of duty." Indeed, in prior Ninth Circuit cases, the Court used the terminology "incident to military service" and "in the course of military duty" almost as if they were interchangeable. *United States v. Lee,* 400 F.2d 558; *Callaway v. Garber,* 289 F.2d 171.

The Court of Appeals for the Sixth Circuit in *Hale v. United States,* 416 F.2d 355 (1969), a case involving a soldier who was injured in an automobile accident off base, the court analyzed the standards derived from *Feres, Brooks, Brown* and *Muniz.* The Sixth Circuit Court concluded that not only is there a distinction between "in line of duty" and "incident to military service", but also that the proper standard

to apply in determining whether or not a serviceman is excluded from recovery under the Federal Tort Claims Act is the standard of "in line of duty." The Court noted that the standard "incident to military service" has many deficiencies as a basis for exclusion under the Federal Tort Claims Act, and it is so lacking in precision that the mere fact that the plaintiff was in military service at the time of the accident can provide a logical basis for the government's arguing for exclusion of the person concerned on a *post hoc, ergo propter hoc* basis. 416 F.2d at 358. The opinion then goes on to indicate that it appeared to the Sixth Circuit Court that this Court in *United States v. Brown, supra,* referred to the standard of "in the course of military duty." Furthermore, the Sixth Circuit felt that this Court in *United States v. Muniz, supra,* again referred to the standard of "in the course of military duty" in discussing the rationale of *Feres.* 416 F.2d at 359. After noting that there is confusion as to the proper standard to be applied among the cases decided by the District Court and by the Courts of Appeals, the Court in *Hale v. United States, supra,* concluded that only if injuries arise "out of or in the course of military duty" would the Federal Tort Claims Act exclusion apply. The Court then remanded the case back to the District Court for further hearing to determine whether or not the injuries sustained by Hale were sustained "in the course of military duty."*

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*The District Court dismissed the *Hale* case after further hearing and determining that the injuries were sustained while in the course of military duty. See *Schwager v. United States,* 326 F.Supp. 1081 (1971) (E.D.Pa.)

There is also a diversity of judicial opinion in the District Courts. For example, in *Downes v. United States,* 249 F.Supp. 626 (D.C.N.C. 1965), *recovery was allowed* where a United States Marine was injured in an on-base automobile accident while he was driving his private vehicle pursuant to a pass authorizing him to leave base. The Court in *Downes* held that the United States could not rely on the broad principles stated in *Feres* to the exclusion of those established in *Brooks* and so concisely enunciated in *Brown*. However, in *Coffey v. United States,* 324 F.Supp. 1087 (S.D. Calif. 1971), *recovery was denied* where a serviceman, who was on way to off-post liberty, died from injuries sustained in an automobile accident occurring within the confines of the military reservation. The Court, after noting that from *Brown* as reinforced by *Muniz, Feres* now rests largely upon the "effect of the maintenance of such suits on discipline," concluded that the case before it posed no different problem in terms of discipline than did the three cases disposed of in the *Feres* opinion.

Among the confusion of standards and diversity of judicial opinions, one point seems consistent: the courts all acknowledge that the *Feres* doctrine is based primarily on the consideration of military discipline and the effects thereon of suits under the Federal Tort Claims Act. In the present case, petitioners' deceased was traveling in a privately owned automobile on a route of the driver's own choosing, and was free from any direct military control when the accident occurred. Therefore, allowance of the

claim in this case would in no way subvert military discipline, so that the exclusion established by *Feres* should not be applicable.

The need for a uniform standard in determining whether recovery should be allowed is obvious. Military bases are scattered throughout the United States and its territories; unless this Court sets down a uniform rule on the point, a serviceman's right to recover for injuries would depend on the fortuitous circumstance of his geographical location at the time of the event giving rise to the injuries.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, April 4, 1972.

Respectfully submitted,
CLARENCE H. PEASE,
Counsel for Petitioners.

THOMAS W. MARTIN,
LEROY Y. FONG,
GEROLD G. WILLIAMS,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 71-2706

Nick Karneges, Et Al., Appellants,
vs.
United States, Appellee.

[January 17, 1972]

ORDER GRANTING MOTION FOR SUMMARY AFFIRMANCE

Before: CHAMBERS and CHOY, Circuit Judges.

The motion of Appellee, United States of America, for summary affirmance of the judgment of the District Court herein is granted.

James P. Karneges, a member of the United States Marine Corps, was killed when the private car in which he was riding hit a tree. Both he and the driver, another Marine, were travelling pursuant to military group travel orders. The District Court found that recovery by Appellants, who are the parents and sister of Karneges, under the Federal Tort Claims Act, 28 U.S.C. §1346(b), was barred by *Feres v. United States,* 340 U.S. 135 (1950). We agree. The accident occurred while Karneges was traveling under

military orders. He was "in line of duty," acting "incident to his military services." Recovery against the United States is therefore barred. *United States v. Lee,* 400 F 2d 558 (9th Cir., 1968); *Callaway v. Garber,* 289 F 2d 171 (9th Cir., 1961).

/s/ Richard H. Chambers
United States Circuit Judge

/s/ Herbert Y. C. Choy
United States Circuit Judge

Appendix B

United States District Court
Southern District of California

Civil No. 71-13-CW

Nick Karneges, Connie Karneges, and Janice Spanos,
Plaintiffs,

vs.

United States of America,
Defendant.

[July 27, 1971]

SUMMARY JUDGMENT

The Court having considered the contentions of the respective parties hereto in reference to the motion of the defendant for summary judgment based upon the Feres Doctrine; *Feres v. United States,* 340 U.S. 143 (1950) and *United States v. Lee,* 400 F.2d 558 (C.A.9, 1969) *cert. den.,* 393 U.S. 1053, and the Court having found that there are no genuine issues of material fact and that the defendant is entitled to a judgment as a matter of law.

In accordance with the findings of fact and conclusions of law filed concurrently herewith, it is,

Hereby Ordered, Adjudged and Decreed that summary judgment in favor of the defendant, United States of America, and against the plaintiffs, Nick Karneges, Connie Karneges and Janice Spanos be and is granted.

Dated: July 27, 1971.

J. Clifford Wallace
United States District Judge

Appendix C

United States District Court
Southern District of California

Civil No. 71-13-CW

Nick Karneges, Connie Karneges, and Janice Spanos, Plaintiffs,

vs.

United States of America, Defendant.

[July 27, 1971]

FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW

In accordance with Local Rule 3(e)4.a., the defendant states those material facts as to which it contends there is no genuine issue, as follows:

Findings of Undisputed Facts

1. In purported compliance with Title 28, United States Code, § 2675(a), the plaintiffs filed an administrative claim with the Department of the Navy, by filing a Standard Form 95, "Claim for Damage or Injury," attached to the First Amended Complaint as Exhibit "A", wherein the attorney for the plaintiffs (as claimant) asserts that the decedent was trav-

eling as a passenger in the private vehicle of Thomas Franklin Crow.

2. In the aforesaid Standard Form 95 the attorney for the plaintiffs states that both the operator of the private automobile and the decedent were members of the United States Marine Corps and were traveling pursuant to group travel orders at the time that the private vehicle left the road and collided with a tree.

3. As alleged in the First Amended Complaint, the operator of the private vehicle, Thomas Franklin Crow, was an employee of the United States of America, acting within the scope of his employment at the time and place of the alleged occurrence.

Conclusions of Law

1. Thomas Franklin Crow was operating his private vehicle within the scope of his employment as a United States Marine at the time and place of the occurrence alleged in the First Amended Complaint.

2. The decedent, James Peter Karneges, was acting within the scope of his employment as a United States Marine, while a passenger in the private vehicle of Thomas Franklin Crow, pursuant to group travel orders, which is more specifically described in Exhibit "A", which is attached to the First Amended Complaint herein.

3. The Feres Doctrine is applicable to the facts of this case so that the United States of America is not liable for the death of a military serviceman where

the death occurred as a result of an activity which is incident to military service, or in the line of military duty. *Feres v. United States,* 340 U.S. 143 (1950), and *United States v. Lee,* 400 F.2d 558 (C.A. 9, 1969), *cert. den.,* 393 U.S. 1053.

4. In the alternative, if the Court were to conclude that the decedent and the operator of the private vehicle, Thomas Franklin Crow, were not acting within the scope of their employment or not acting "within the line of military duty" or that the occurrence was not incident to military service, then there would be no basis of jurisdiction in this Court pursuant to the Federal Tort Claims Act, Title 28, United States Code, § 1346(b) as amended, for the reason that same applies to cases where an employee of the Government is acting within the scope of his employment.

Any of the foregoing conclusions of law which may be deemed to be findings of fact are so found; any of the foregoing findings of fact which may be deemed to be conclusions of law are so concluded.

Dated: July 27, 1971.

J. Clifford Wallace
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1971

NICK KARNEGES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1299

NICK KARNEGES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. This action was commenced in the United States District Court for the Southern District of California on behalf of James Peter Karneges, deceased, against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680. Karneges, a member of the United States Marine Corps, was killed in an automobile accident while riding as a passenger in

a private car in which he and the driver, another Marine, were travelling under military group travel orders (Pet. App. C, p. v). The complaint alleged that the driver was a government employee, that at the time of the collision he was acting within the scope of his employment, and that his negligence caused the accident (*ibid*).

The district court ruled (Pet. App. c, pp. v-vi) that recovery was barred under the decision of this Court in *Feres* v. *United States*, 340 U.S. 135, since, at the time of the accident, Karneges was engaged in activity "incident to military service." Moreover, it observed (Pet. App. c, p. vi) that, if Karneges and the driver had not been acting within "the line of military duty," the driver would not have been acting within the scope of his employment, and, as a consequence, the United States could not, for an entirely separate reason, have been held liable under the Federal Tort Claims Act. The court of appeals summarily affirmed (Pet. App. A, pp. i-ii).

2. The decisions below are correct; they do not conflict with the decisions of other circuits and present no grounds for further review by this Court.

Karneges, a member of the Marine Corps, was concededly (Pet. 3) travelling pursuant to military group travel orders at the time of the accident. The fact that he was in a private vehicle when he sustained his fatal injuries does not alter the conclusion that those injuries occurred while he was acting "in the course of military duty." *Feres* v. *United States*,

supra, 340 U.S. at 146. Accordingly, the courts below properly barred recovery.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[1] Petitioners' claim that the decision below is in conflict with *Hale* v. *United States*, 416 F.2d 355 (C.A. 6), is not well taken. *Hale* did not involve injuries sustained in the course of travel pursuant to military orders. In any event, following the court's remand in *Hale*, both the district court and the court of appeals denied recovery under *Feres* for the same reason given here—*i.e.*, that the injuries were sustained incident to military service. See *Hale* v. *United States*, 452 F.2d 668 (C.A. 6).

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